Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-41-1992
JEMURI SERJAN CJ (BORNEO), PEH SWEE CHIN AND MOHAMED DZAIDDIN SCJJ
2 DECEMBER 1993

Civil Procedure *— Judgment — Setting aside — Whether irregular and may be set aside — If regular whether it may be set aside on ground that respondent has a good defence on merits — Discretion of judge — Rules of the High Court 1980 O 19 r 9, O 42 r 10(1), (2) & (3)*

Civil Procedure *— Judgment — Proper date of judgment — Whether proper date was when draft copy filed or when fair copy filed — Whether draft copy necessary in cases under O 19 r 3 of the Rules of the High Court 1980 — Rules of the High Court 1980 O 19 r 3*

The first appellant, a housing developer, applied to the respondent for credit facilities in order to carry out construction of a housing project ('the project'). By an agreement, the respondent approved a secured overdraft of RM6.3m and an end-finance facility of up to RM10m to the first appellant upon the security of a charge over the land which was to be developed and the joint and several guarantees of the second, third, fourth, fifth and sixth appellants. The respondent released the overdraft of RM6.3m but did not release the entire end-finance facility. The appellants averred that as a result of the respondent's failure to observe and fulfil its obligations under the agreement, the first appellant could not complete the project. Hence, the first appellant alleged that it had suffered damages in the sum of RM29.1m due solely to the respondent's breach of agreement.

On 22 February 1991, the writ and statement of claim were served on the solicitors for the respondent. Appearance was entered but no defence was filed by the due date and the appellants' solicitors served on the respondent's solicitors 48 hours' notice requiring the defence to be filed. The respondent's solicitors requested a further three weeks to file the defence, but nevertheless filed a defence on 26 March 1991 and served it on the appellants' solicitors on the same day. Three weeks later, on 19 April 1991, the senior assistant registrar ('the SAR') granted a judgment in default against the respondent but the judgment itself was dated 23 March 1991. The respondent applied to set aside the judgment in default. In the High Court, it was argued on behalf of the appellants that the judgment was entered when the draft order was filed for the approval of the SAR, ie on 23 March 1991, and the date of filing the fair judgment could be related back to that date. In allowing the respondent's application to set aside the judgment, the judge held that: (i) the judgment should have been dated after 19 April 1991, by which time a defence had already been filed, and therefore,

A the SAR should have rejected the application for default judgment; and (ii) the respondent had shown that it had a defence on the merits. The appellants have appealed. In this appeal, the issues were: (i) whether the judgment in default dated 23 March 1991 but actually entered on 19 April 1991 was an irregular judgment and could be set aside; and (ii) whether, assuming the judgment was regular, it could nevertheless B be set aside as there was a good defence on the merits.

Held, dismissing the appeal:

(1) It must be the fair copy of the judgment that should be presented for entry in compliance with all the requirements of the Rules of C the High Court 1980 ('the RHC'). A draft judgment is not a judgment since a draft implies that it needs perfection and approval. In a case under O 19 r 3 such as this, there is no statutory obligation on the part of the solicitors for the appellant to file a draft judgment which is required only in a case under O 42 r 8. What was done here was *ex abundanti cautela*. D

(2) On the proper construction of O 42 r 10(1), (2) and (3), the judgment in default was irregular and must be set aside ex debito justitiae. There was uncontroverted evidence that the judgment was entered on 19 April 1991, the day when it was presented and signed by the SAR after the prescribed fees had been paid. E

(3) It was only proper that all the issues raised the by respondent, which were substantial and had merits, ought to be tried at a proper trial so that witnesses could be called to explain to the court what the nature of commercial banking practice in processing and approving the loans are and other relevant issues. Under the circumstances, there was no ground to justify the court in F interfering with the learned judge's exercise of his discretion under O 19 r 9 of the RHC.

[Bahasa Malaysia summary

G Perayu pertama, sebuah syarikat pemaju perumahan, telah memohon kepada responden untuk kemudahan kredit untuk menjalankan pembinaan sebuah projek perumahan ('projek itu'). Melalui suatu perjanjian, responden telah meluluskan suatu overdraf bercagar yang berjumlah RM6.3 juta dan suatu kemudahan pembiayaan akhir sehingga jumlah RM10 juta kepada perayu pertama berdasarkan suatu H caj ke atas tanah yang akan dimajukan serta jaminan bersesama dan berasingan yang diberikan oleh perayu kedua, ketiga, keempat, kelima dan keenam. Responden telah melepaskan overdraf sebanyak RM6.3 juta itu tetapi tidak melepaskan keseluruhan kemudahan pembiayaan akhir itu. Perayu mendakwa bahawa kegagalan responden I melaksanakan obligasinya di bawah perjanjian itu telah mengakibatkan perayu pertama tidak dapat menghabiskan projek itu. Lantaran itu, perayu pertama mendakwa bahawa ia telah mengalami kerugian sejumlah RM29.1 juta akibat keingkaran perjanjian oleh responden.

Pada 22 Februari 1991, suatu writ dan pernyataan tuntutan telah disampaikan kepada peguamcara responden. Kehadiran telah dimasukkan tetapi pembelaan tidak difailkan menjelang tarikh yang ditetapkan dan peguamcara perayu telah menyampaikan kepada peguamcara responden notis 48 jam yang mengkehendaki pembelaan difailkan. Peguamcara responden telah meminta perlanjutan masa selama tiga minggu untuk memfailkan pembelaan, tetapi namun demikian telah memfailkan pembelaan pada 26 Mac 1991 dan menyampaikannya kepada peguamcara perayu pada hari yang sama juga. Tiga minggu kemudian, pada 19 April 1991, penolong kanan pendaftar ('PKP') telah memberikan suatu penghakiman ingkar terhadap responden tetapi penghakiman itu bertarikh 23 Mac 1991. Responden telah memohon untuk mengetepikan penghakiman ingkar itu. Di Mahkamah Tinggi, telah dihujahkan bagi pihak perayu bahawa penghakiman telah dimasukkan apabila perintah draf difailkan untuk kelulusan PKP, yakni pada 23 Mac 1991, dan tarikh pemfailan salinan bersih penghakiman boleh dibelakangkan kepada tarikh itu. Ketika membenarkan permohonan responden untuk mengetepikan penghakiman itu, hakim telah memutuskan bahawa: (i) penghakiman itu seharusnya bertarikh selepas 19 April 1991, bilamana pembelaan telah pun difailkan dan oleh itu, PKP sepatutnya telah menolak permohonan untuk penghakiman ingkar; dan (ii) responden telah menunjukkan bahawa ia mempunyai pembelaan atas merit. Perayu telah membuat rayuan. Di dalam rayuan ini, isu-isu yang timbul adalah: (i) sama ada penghakiman ingkar yang bertarikh 23 Mac 1991 tetapi yang sebenarnya dimasukkan pada 19 April 1991 adalah suatu penghakiman luar aturan dan boleh diketepikan; dan (ii) sama ada, andaikata penghakiman itu adalah mengikut aturan, ianya walau bagaimanapun boleh diketepikan kerana terdapat pembelaan atas merit.

Diputuskan, menolak rayuan itu:

(1) Semestinya salinan bersih penghakiman yang dikemukakan untuk kemasukan mengikut kesemua keperluan Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Draf penghakiman bukannya suatu penghakiman kerana draf secara tersirat membawa makna bahawa ianya memerlukan penyempurnaan dan kelulusan. Dalam suatu kes di bawah A 19 k 3 seperti ini, tidak ada obligasi statutori ke atas peguamcara perayu untuk memfailkan suatu penghakiman draf yang dikehendaki cuma dalam kes di bawah A 42 k 8. Apa yang telah dibuat di sini adalah *ex abundanti cautela*.

(2) Atas pentafsiran sebenar A 42 k 10(1), (2) dan (3), penghakiman ingkar itu adalah luar aturan dan mesti diketepikan ex debito justitiae. Terdapat keterangan yang tidak disangkal bahawa penghakiman itu telah dimasukkan pada 19 April 1991, hari apabila ianya dikemukakan dan ditandatangani oleh PKP selepas fee yang berpatutan telah dibayar.

(3) Adalah berpatutan bahawa kesemua isu yang ditimbulkan oleh responden, yang memang substansial dan mempunyai merit, semestinya dibicarakan di suatu perbicaraan yang sebenar supaya saksi boleh dipanggil untuk menerangkan kepada mahkamah amalan sektor bank swasta dalam memproses dan meluluskan pinjaman dan isu lain yang relevan. Dalam keadaan kes ini, tidak terdapat alasan untuk menyokong mahkamah supaya bercampurtangan dengan penggunaan budi bicara hakim di bawah A 19 k 9 KMT.]

Notes

For cases on setting aside judgments, see 2 *Mallal's Digest* (4th Ed) paras 1286–1348.

Cases referred to

1 *Tatchee Machinery Agency v Posan Timber Trading Sdn Bhd* [1989] 1 MLJ 388 (folld)
2 *Jasabena Sdn Bhd v Beh Heng Poo & Anor* [1985] 1 MLJ 394 (distd)
3 *Evans v Bartlam* [1937] AC 473; [1937] 2 All ER 654 (folld)
4 *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc* [1986] 2 Lloyd's Rep 221 (refd)
5 *Fira Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40 (refd)
6 *PL Construction Sdn Bhd v Abdullah bin Said* [1989] 1 MLJ 60 (refd)
7 *East Asiatic Co (M) Bhd v Kamanis Sdn Bhd* [1985] 2 MLJ 227 (refd)
8 *Eng Mee Yong v V Letchumanan* [1979] 2 MLJ 212 (refd)
9 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504; [1975] 2 WLR 316 (refd)
10 *Independent Automatic Sales Ltd v Knowles & Foster* [1962] 3 All ER 27; [1962] 1 WLR 974 (refd)
11 *Hadley v Baxendale* (1854) 9 Ex 341 (refd)

Appeal from: Civil Suit No D1–22–2111–1990 (High Court, Kuala Lumpur)

CV Das (*Anthony Leong* with him) (*Riza Leong & Partners*) for the appellants.

T Thomas (*Aznam bin Mansor* with him) (*Skrine & Co*) for the respondents.

Cur Adv Vult

Jemuri Serjan CJ (Borneo) (delivering the judgment of the court): There are only two basic important issues which call for our determination in this appeal, one being whether the judgment in default entered by the appellants against the respondent was irregular and thereby may be set aside under

O 19 r 9 of the Rules of the High Court 1980, and the other whether, assuming that the judgment is regular, it nevertheless may be set aside on the ground that the respondent has a good defence on the merits. A

The facts of the case may be briefly stated as follows. The first appellant is a private limited company and engaged in the business of a housing developer in respect of a housing project in Taman Seri Buloh. The second appellant, also a private limited company, signed a guarantee on 26 August 1986 to guarantee all moneys granted by the respondent to the first appellant and all the liabilities incurred by the first appellant in respect of the loans not exceeding RM6.3m, namely, the total amount of the secured overdraft facility. The third, fourth, fifth and sixth appellants are also guarantors under a guarantee dated 12 August 1986 for the same sum of RM6.3m as a secured overdraft facility granted by the respondent to the first appellant. At the written request of the first appellant dated 10 November 1983, the respondent, on 17 May 1984, approved and granted credit facilities to the first appellant as a financing credit line amounting to RM10m, and an overdraft facility amounting to RM4.3m which was later revised to RM6.3m as a bridging finance loan for the construction of 236 low cost houses/flats; 148 single storey terrace houses and 13 two storey shophouses. The revised amount of the end-finance facility was in response to a request from the first appellant for a restructured facility and approved by the respondent by his letter of offer dated 3 July 1986. B C D

On 22 December 1990, the appellants filed a writ against the respondent claiming damages in the sum of RM29.1m, being loss of profits, loss of sales, interest imposed by the respondent on account of delay or stoppage in the work, compensation paid to purchasers because of delay in granting possession, solicitors' fees, management costs, compensation to guarantors, accumulated interest, withdrawal of offer and loss of reputation on the part of the first appellant on the averment that the respondent was guilty of breach of its obligation under the provisions of the agreement dated 22 July 1985 and the letter of offer dated 3 July 1986, both of which will be discussed later and referred to in this judgment as 'the banking contract'. It was averred in the statement of claim that on the basis of the application dated 10 November 1983, whereby the first appellant applied for credit facilities, it was crucial that the first appellant obtained credit facilities from the respondent in order to implement the housing scheme successfully and an immediate payment of RM2.4m was required for the purpose of statutory and professional fees. Further, it was averred that under the terms of the agreement dated 22 July 1985, the respondent had agreed to release the total amount of the end-finance facility that the respondent had offered to the qualified purchasers of the subdivided lots together with the buildings thereon, not exceeding RM10m, direct to the first appellant, and that the respondent was aware that this end-finance facility was to be utilized for the repayment of the overdraft facilities upon acceptance of the application for the bridging finance and end-finance facility by the respondent. On that understanding, the first appellant had commenced development of the housing scheme. E F G H I

A The first appellant had submitted 223 applications for the end-finance facility and it was averred that if all the applications were to be approved, a sum of RM7.07m would be made available to the first appellant. However, the respondent had failed to meet its obligations as a banker under the agreement and the terms agreed upon in the application letter and offer B letter, when it rejected 62 applications nine months after receipt of the applications, and saw fit to approve only 109 applications eight months after the date of submission of the applications. Even after granting approval to the 109 applications and after 30–50% of the progressive works had been certified to have been completed, the respondent still failed, refused or neglected to disburse the end-finance sum to the 18 purchasers and to the C first appellant. Besides, the fate of 52 other applications had not been made known by the respondent. Thus, it was averred that the failure on the part of the respondent to observe and fulfil its obligations under the banking contract was mainly due to management and financial problems faced by the respondent with the result that the first appellant could not continue to complete the housing scheme. Hence, under the circumstances, the first D appellant suffered damages in the sum of RM29.1m due solely to the breach by the respondent of the banking contract.

On 22 February 1991, a writ of summons endorsed with the statement of claim was served on Messrs Skrine & Co, the solicitors for the respondent. On 23 February 1991, appearance was entered on behalf of the respondent E and served on the solicitors for the appellant on the same day. The last day for filing the defence was 16 March 1991, but when no defence was filed on that date, the appellants' solicitors, by letter dated 19 March 1991, served on the respondent's solicitors the customary 48 hours' notice requiring the defence to be filed. Upon receipt of this letter and after futile efforts to communicate with the appellants' solicitors, the respondent's solicitors F wrote to seek an extension of time of three weeks to file the defence. Notwithstanding this request, a defence was nevertheless prepared and filed on 26 March 1991. It was served on the appellants' solicitors on the same day. Three weeks later, on 19 April 1991, a judgment in default was entered by the appellants' solicitors but the judgment itself was dated 23 March G 1991.

The question for our determination on the first issue is, therefore, whether the judgment in default dated 23 March 1991, but actually entered as a fair-copy on 19 April 1991, is an irregular judgment and thereby may be set aside on that score. Relying on the authority of the decision of VC George J in the case of *Tatchee Machinery Agency v Posan Timber* H *Trading Sdn Bhd*,[1] his Lordship in the High Court below decided that the judgment in default of appearance should have been dated after 19 April 1991 and not 23 March 1991, ie the date stated in the draft judgment, by which time there was already a defence filed and the senior assistant registrar, therefore, should have rejected the application for a default I judgment. His Lordship continued to say that in spite of that, there was still a remedy available to the appellants by applying to have the defence struck out for not complying with the rules and such application would be heard inter partes.

It is worthy of note that in *Tatchee Machinery Agency*'s case,[1] a distinction was drawn between judgments or orders that were pronounced, given or made, and judgments that were entered. In the case of judgments to be pronounced, the pronouncement, giving or making of the judgments or orders, had to be made before the judgments or orders could be drawn up. Such judgments or orders take effect from the day of their dates and should be dated on the day on which they were pronounced, given or made (see O 42 r 7). On the other hand, in the case of judgments or orders that are entered, they have to be drawn up first before they are entered, and they take effect on their being entered. The date of the judgments or orders must necessarily be the date they are entered (see O 42 r 10(2)). With respect, *Tatchee Machinery Agency*'s case[1] was correctly decided.

Before us, counsel for the appellants advanced the argument that *Tatchee Machinery Agency*'s case[1] was wrongly decided because O 42 r 10(5) was not considered in holding that in dating the default judgment the date when the draft judgment was filed, ie 23 March 1991, the senior assistant registrar was backdating the judgment. In that case, the court also failed to note the distinction between 'drawing up' and 'entering'. Counsel submitted that O 42 r 10(4) and (5) made it clear that an order had to be drawn up before being entered; 'drawing up' being the physical preparation of the draft order and 'entering' being the filing of the draft order. On the proper interpretation of O 42, according to counsel, filing should be equated with entering so that the date of a default judgment was the date on which the draft default judgment was filed in court, quoting Edgar Joseph Jr J (as he then was) in *Jasabena Sdn Bhd v Beh Heng Poo & Anor.*[2] Therefore, in effect, what was submitted was that the date when the draft was filed was the date when it should be entered, namely, 23 March 1991 and not 19 April 1991. In any event, *Tatchee Machinery Agency*'s case[1] was a default of appearance case that was decided under O 13 r 7, which rule did not apply to the instant case which was a default of defence case under O 19 r 8. He, therefore, submitted that the default judgment was regular and that the respondent must show a defence on the merits in order to succeed in its application to set aside the default judgment.

We must admit that the proposition was persuasive but, with respect, we cannot accept it as it lacked substance, and putting it at its highest, it had the trappings of an ingenious proposition.

It did not escape our attention that there were two occasions when the filing of the judgment took place, one on 23 March 1991 when the draft judgment was filed, and the other on 19 April 1991 when the fair copy was filed. If counsel was right in his submission, then there should be two separate dates when 'entering' was made since 'entering', according to him, meant 'filing'. Surely it is beyond argument that there should not be two separate dates of entering the same judgment and we cannot accept the draft judgment for the purpose of the entry under O 42 r 10(1) as the solicitors for the first appellant chose to have a draft faired in the first instance. It must be the fair copy of the judgment that should be presented for entry in compliance with all the requirements of the Rules of the High Court 1980.

A In our view, in a case under O 19 r 3, as is the case in this appeal, there is no statutory obligation on the part of the solicitors for the appellant to file a draft judgment which is required only in a case under O 42 r 8. What was done here was *ex abundanti cautela*. The relevant rule applicable in the instant case is r 10(1), (2) and (3). The solicitors for the appellants need only to draw up the judgment under r 10(2) and present it to the senior B assistant registrar for entry and, under r 10(1), the senior assistant registrar should enter it in the cause book kept for that purpose. Under this sub-rule, on entering such judgment, the senior assistant registrar should file the judgment and return the duplicate thereof to the appellants' solicitors. It must, however, also be emphasized here that at the time of entering the C judgment, the prescribed court fees under O 91 for entry of such judgment must first be paid by means of the prescribed praecipe which will be duly registered and impressed on the copy of the judgment. The praecipe in this case was registered on the day the fees were paid and the judgment should only be entered after the payment of the prescribed fees. There was uncontroverted evidence that the judgment was entered on 19 April 1991, D the day it was presented and signed by the senior assistant registrar after the prescribed fees had been paid. It should also be obvious from the above that the determining factor for the purpose of deciding when such judgment is entered under O 42 r 10 is the payment of the prescribed court fees without which the judgment could not be entered and signed by the senior assistant E registrar. The senior assistant registrar was labouring under a mistaken belief that he was under a duty to accept the draft judgment and sign it for approval. At any rate, in our view, for the purpose of O 42 r 10(1) a draft judgment is not a judgment since a draft implies that it needs perfection and approval. It follows that the argument that the judgment was entered when the draft was filed for the approval of the senior assistant registrar and that F the date of filing the fair judgment could be related back to the date when the draft copy of the judgment was filed was not correctly grounded and could not be sustained and we reject it as being without basis. The weakest point in the appellants' arguments was on the submission that the learned judge did not take into consideration r 10(4) and (5). The answer to this is G simple. Rule 10(4) and (5) are only clearly applicable to orders and not to the judgments and the learned judge was absolutely right to ignore the two subrules. For the sake of completeness, we should interpolate to say that *Jasabena*'s case[2] has no application to cases under O 42 as it concerns a case under O 53 which is distinguishable, not only in its terms but also on the facts obtaining in the present case. Equating filing with entering under such H order is fully justified in the context of that order.

In our view, on the proper construction of O 42 r 10(1), (2) and (3), the judgment in default was irregular and must be set aside ex debito justitiae and we, therefore, order that the judgment be accordingly set aside. This would be a sufficient ground for us to dismiss the whole appeal but then the I learned judge went on to consider, assuming he was wrong to hold the default judgment irregular, whether on the merits of the defence, the judgment should also be set aside in the exercise of his discretion under O 19 r 9.

It must be pointed out at this juncture that it is not unusual to read in English law reports of plaintiff's solicitors signing judgments in default of appearance and perhaps in default of defence as well (see *Evans v Bartlam*[3] at p 477), giving the impression that it is actually so in practice, but in Malaysia, strictly in compliance with O 42, it is not the plaintiff's solicitors who sign such a judgment but the senior assistant registrar on the presentation of the judgment and payment of the court fees. The plaintiff's solicitors do not sign the judgment but such a judgment is entered by the senior assistant registrar, to use the technical term.

His Lordship held that he was satisfied that the respondent had shown that he had a defence on the merits and on that score also, the judgment was set aside, citing *Evans v Bartlam*[3] on the assumption that he was wrong in deciding that the default judgment was irregular.

On the second issue, the starting point in the light of the provisions of O 19 r 9 is whether the learned judge is right in the exercise of his discretion when he set aside the default judgment and in doing so, did his Lordship correctly interpret and apply the guidelines formulated by the Law Lords in the case of *Evans v Bartlam*.[3] It seems to us that counsel for the appellants did not dispute the correctness of Lord Atkin's dictum that unless and until the court has pronounced judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure. What counsel for the appellants urged upon us was that in order for the court to set aside a default judgment under O 19 r 9, the court should apply the test as formulated by Sir Roger Ormrod in *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc.*[4] In that case, Sir Roger Ormrod expressed the view that on its proper interpretation, the Law Lords in the case of *Evans v Bartlam*[3] clearly contemplated that a defendant who was asking the court to exercise its discretion to set aside the default judgment should show that he had a defence which had a real prospect of success. Therefore, counsel for the appellants urged us to accept Sir Roger Ormrod's view that in order to arrive at a reasoned assessment of the justice of the case, the court must form a professional view of the probable outcome of the judgment if the judgment were to be set aside and the defence develop, and that the 'arguable defence' must carry some degree of conviction. However, it behoves us to point out from the outset that Sir Roger Ormrod himself did not appear to be firm as to which standard should be applied because at one point in his judgment he was talking about a 'real prospect of success' and at another 'reasonable prospect of success', and in between he ventured another test that in order to set aside a default judgment the defence must show that there was an 'arguable defence' which must carry some degree of conviction. Even if we accept that these standards are mere options for the court to take, Sir Roger Ormrod appeared to us to depart from the standard that was to be met by a defendant in such a case although he claimed that the standard he formulated was based on a construction of the words used by the Law Lords in *Evans v Bartlam*[3] in that the standard as we understand them in Malaysia as formulated by way of the guidelines in *Evans v Bartlam*[3] is much lower.

A scrutiny of the case of *Evans v Bartlam*[3] would show that different Law Lords used different terms but they all seemed to agree that for the defendant to succeed in his application to set aside a default judgment, he must show that the defence had merits that ought to be tried by the court. In other words, in popular language, the defence was not a sham defence. Lord Atkin was of the view that it was sufficient for the defendant to file an affidavit on merits, meaning that the applicant must produce to the court evidence that he had a prima facie defence (see p 480). Lord Wright, on the other hand, at p 489, was of the view that the primary consideration was whether the defendant had merits to which the court should pay heed, and, if the merits were shown, the court would not, prima facie, desire to let a judgment pass, on which there had been no proper adjudication. If the defendant showed merits, then he clearly showed an issue which the court should try. Lord Russell of Killowen, on his part, reminded the courts not to fail to consider whether any useful purpose could be served by setting aside the judgment and that obviously, no useful purpose would be served if there were no possible defence to the action. In other words, the standard laid down by Lord Russell is not that much lower and that it is sufficient if the defendant can show he has a possible serious defence.

In Malaysia, the tendency of the courts hitherto is to follow the guidelines enunciated in the case of *Evans v Bartlam*,[3] bearing in mind also that this is a House of Lords case while *Saudi Eagle*'s case[4] is the decision of a Court of Appeal. In Malaysia, we are not bound by the decisions of the House of Lords but the courts always accept those authorities as persuasive authorities which may be followed. Indeed, this court has had occasion to consider the question whether a judgment in default should be set aside under O 13 r 8 and did in fact approve and followed Lord Atkin's dictum. Thus, in *Fira Development Sdn Bhd v Goldwin Sdn Bhd*,[5] Lee Hun Hoe CJ (Borneo) (as he then was) held that a defence on the merits meant merely raising only an arguable or triable issue, not unlike any O 14 cases and that a judgment in default was not a judgment on the merits. In other words, it was decided in that case that a judgment in default may be set aside if the facts show a defence has merits. *Fira*'s case[5] was followed by Zakaria Yatim J in *PL Construction Sdn Bhd v Abdullah bin Said.*[6] Again, VC George J in *East Asiatic Co (M) Bhd v Kamanis Sdn Bhd*[7] used such expression as 'bona fide reasonable defence' to describe the standard of the defence that must be met for the applicant to succeed in setting aside a default judgment, although he cited no authority for his proposition, and it seemed to us the proposition was redolent of Lord Atkin's dictum. Consistent with the decision of our own courts in the past in dealing with issues such as those under O 13 r 8 and O 19 r 9, the guidelines in *Evans v Bartlam*[3] should be accepted. In our view, in order to succeed in his application under these orders, the applicant must show that he has a defence which has some merits and which the court should try. To use common and plain language, the applicant must show that his defence is not a sham defence but one that is prima facie, raising serious issues as a bona fide reasonable defence that ought to be tried because obviously if the defence is a sham defence, there is no defence and the application must fail. It need hardly be emphasized

that in order for the court to arrive at a decision that the defence has merits, it must perforce make a reasoned assessment of the justice of the case by forming a professional view of the probable outcome of the case, but this is stating the obvious. It involves a mental process that goes through the mind of a judge when making a decision in any case, weighing the evidence of a litigant against that of another on the facts alleged by a party against those of the other before finally coming to a decision. At any rate, whether we follow *Saudi Eagle*[4] or *Evans v Bartlam*,[3] both cases only lay down, not rules of law that must be stringently complied with, but merely guidelines to assist a judge in the exercise of his discretion. So long as the judge exercises his discretion according to principles of law, the appellate court would hesitate to interfere with the judge's exercise of discretion. It is for the appellants to convince us that this is a proper case for our interference with the learned judge's exercise of his discretion under O 19 r 9.

Now it is true that in matters of discretion no one case can be authority for another (per Lord Wright in *Evans v Bartlam*[3]) and in deciding this appeal, we have to examine the facts as they appear on the pleadings and in the affidavits of the parties, but before we go into them in detail we also remind ourselves that where there is a conflict of evidence on affidavits, it would not be proper for us to believe one side and disbelieve the other. Such conflict should be resolved at the trial as it is not our function to try to resolve conflicts of evidence on affidavits at this stage. (See *Eng Mee Yong v V Letchumanan*[8] and *American Cyanamid Co v Ethicon Ltd.*[9])

Casting our minds back to the statement of claim and the opposing affidavits of Encik Chien Kien Chuen, a director of the first and second appellants, and on a careful analysis of the averments, the irresistible conclusion that is to be drawn therefrom is that the basis on which the cause of action arose contains two elements. The appellants started off with the premise that the first appellant had categorically stated in its letter of application dated 10 November 1983, that the release of the credit facilities were crucial to the implementation of the said housing project. The full text of the letter is reproduced:

> 10 November 1983
>
> Mr KC Boon,
> Executive Director
> United Malayan Banking Corp Bhd
> UMBC Building
> Jalan Sulaiman
> Kuala Lumpur
>
> Dear Mr Boon
>
> Proposed housing scheme on Lot 14679, Mukim of Sungei Buloh, Selangor
> Application for credit facilities
>
> Further to our recent meeting in your office together with your Mr PK Sim, we are pleased to enclose the following:
>
> (1) Letter of approval from the Pengarah Tanah dan Galian, Selangor approving the above-mentioned housing scheme.

A (2) A copy of the report and valuation prepared by Khong & Jaafar Sdn Bhd placing a value of RM9m on the land.
(3) A copy of the layout plan of the proposed development prepared by our architect, Jurubina Sinar Murni Sdn Bhd.
(4) A copy of the economic viability study including cash flow projections prepared by our quantity surveyor, Nik Farid & Loh Sdn Bhd.

B You will note from the enclosed documents that it is a very attractive and viable scheme comprising mainly low cost and medium low cost houses which the government is encouraging developers to build. Our company is bumiputra majority held and the main beneficiary shareholders are as follows:

(1) Tengku Mustaffar Ibni Tengku Idris Shah — a businessman.
C (2) Encik Abdul Aziz bin Yahaya — a professional manager and company director.
(3) Mr Lim Fung Chee — managing director of Kumpulan Emas Sdn Bhd and a director of several companies.
(4) Mr KC Cheah — a chartered/professional civil engineer with over 15 years' construction and property development experience, currently the managing
D director of Siang Management Services Sdn Bhd, providing property and construction management services.

The above gentlemen are all experienced businessmen and professionals.

Our company had earlier taken a term loan in 1980 from your bank (your ref CRO/CBK/KLE/SC) which had since been fully repaid.

E It is crucial that our company must obtain credit facilities in order to implement the scheme successfully and immediate payment in the form of statutory and professional fees amounting to RM2.4m is required. Infrastructural work in expected to commence in early 1984 and the whole scheme is expected to be completed in two years. Details are indicated in the cash flow projections.

As shown in the study by our quantity surveyor, the company will require
F funding facilities as follows:

(1) Bank overdraft for immediate drawdown	RM 3m
(2) Bridging loan to be disbursed based on architect's/engineer's certificates commencing from early 1984	RM12m
(3) End-financing to assist buyers	RM34m

G

As security for the above facilities, the company will create a first legal charge on the subject property in favour of your bank together with joint and several guarantees to be given by all directors of the company.

We would be grateful if you could approve these facilities as soon as possible to assist our company to complete the proposed development.

H Yours faithfully
Hasil Bumi (Perumahan) Sdn Bhd
—Sgd—
(KC Cheah)
Director

I Encl

As will be discussed later, only the following facilities were approved, namely:

(1) secured overdraft to the limit of RM6.3m which was the refund figure at the request of the first appellant; and
(2) end-finance facility up to RM10m.

The secured overdraft facility was meant to be utilized for financing the development of the housing estate, consisting of 236 low cost flats/houses, 148 single storey terrace houses, 177 double storey terrace houses and 13 double storey shophouses. On obtaining and securing the commitment of the respondent to grant and release the said credit facilities, the first appellant commenced work and sales of the houses to be constructed. The appellant specifically laid stress on their averments that the respondent held themselves out to the first appellant's purchasers that they were the end-financiers of the housing scheme, and on the strength of this assumption, 223 applications were submitted to the respondent for approval. Out of this number of applications, only 109 applications were approved, but so far no drawdowns had ever been made.

The appellants averred further that the breach of the banking contract was attributed directly to management and financial problems faced by the respondent. Thus, by para 14 of the statement of claim and para 11 of the affidavit dated 14 May 1991 of Encik Chien Kien Chuen, it was averred that the respondent had breached their duties under the arrangement, the cumulative effect of which resulted in the failure of the first appellant to continue and complete the housing project, thereby suffering the damages claimed for in the writ of summons.

To our minds, the two elements constituting the basis on which the cause of action was based can be summarized as follows:

On the premise that the release of the facilities (which particular facilities were not specifically pleaded) was crucial to the development and completion of the housing scheme, firstly, the failure on the part of the respondent to release these facilities and, secondly, based on the same premise, the failure on the part of the respondent to release the approved end-finance loans when the applicants had complied with the conditions for the approval of the end-finance loans, at least in respect of the 109 approved applications, led to breaches of the banking contract. The cumulative effect of these breaches, therefore, according to the pleadings and the affidavits-in-opposition, were the direct cause of the abandonment of the housing project and the resultant damages they suffered.

On their face value, the alleged breaches on the part of the respondent to disburse the facilities could also include the breach on the part of the respondent to release the secured overdraft, although counsel for the appellants in his argument never in fact alluded to it. This was because the appellants claimed the housing project failed because they did not get the facilities which had been promised them and because it was the secured overdraft that was meant to be used to finance the development and completion of the housing scheme and not the end-finance. If there are any merits at all on these allegations, it seems to us the respondent has an equally good prima facie defence which would be discussed later. That it was contemplated by the appellants that the breach of disbursing the

A bridging finance facility was also a basis for the claim to damages was further explained by the citation of the second, third, fourth, fifth and sixth appellants as parties to the action.

The second appellant, it must be recalled, was the corporate guarantor for the loan of RM6.3m under a guarantee dated 26 August 1986 and the third, fourth, fifth and sixth appellants were guarantors under a guarantee B dated 12 August 1986 in respect of the same amount, being the bridging finance facility to be utilized to finance the development of the housing project. On the other hand, the guarantors for the end-finance facility were the third appellant [Encik Chien Kien Chuen], Encik Hoo Ke Ping @ Hoo Khi Ping, Encik Cheah Kok Cheong, Encik Lim Fung Chee and Tengku C Mustaffar Ibni Tengku Idris Shah, in respect of the RM10m end-finance facility which was to be used to repay the bridging finance facility. It is somewhat baffling why, if the cause of action is failure to release this amount or such amount as had already been approved, except for the third appellant, the rest of the guarantors were never cited as parties to the action.

D Thus, on the alleged breach to disburse the facilities agreed to be offered to the first appellant, the respondent's defence was that they had released the secured overdraft, namely, the bridging finance loans in the sum of RM6.3m, and as such it was averred by the respondent that they had performed their obligations under the banking contract, and if the housing E estate could not be completed it certainly was not due to the failure of the respondent to release the bridging finance loan and therefore the respondent could not be made accountable for any damages as a result of the abandonment of the project for lack of funds or for any other reason. By way of amplification of the defence to show that the failure on the part of the first appellant to continue and complete the housing project was not F due to the breach of the banking contract on the part of the respondent, the respondent, by way of an affidavit of Encik Azizan bin Adam, the manager of the respondent, averred that it was due to the incompetent and inefficient management of the scheme and that, on 17 March 1988, the first appellant had entered into a contract with Ingeback (Malaysia) Sdn Bhd to complete G the project within 12 months, and that on 23 April 1988, Bank Utama (M) Bhd gave a loan of RM9.5m including the end-finance to the first appellant. With all these additional bridging finance, there was no reason why the housing project could not be completed. Prima facie, this certainly is more than just an arguable defence. It is a good defence which has merits and which the court should pay heed to.

H At this juncture, it would be appropriate to look at the relevant terms of the letter of offer relied on by the first appellant to ascertain the terms of the banking contract. The relevant part of the letter is reproduced for convenience:

I 3 July 1986

Hasil Bumi (Perumahan) Sdn Bhd
4th Floor, Lobby B, Wisma Segar
No 9, Jalan Thamby Abdullah Dua

Brickfields
50470 Kuala Lumpur.

Dear Sir,

Re: Approval of revised credit facilities

We are glad to inform you that we have approved the following revised facilities in your favour, with terms and conditions as follows:

Type and limit of facilities	:	Secured overdraft RM 6,300,000 End-financing RM 10,000,000
Purpose	:	The secured overdraft is for financing the development of a housing estate known as Taman Sri Buloh with 236 low cost flats/houses, 148 single storey terrace houses, 177 double storey terrace houses and 13 double storey shophouses to be constructed under Phases I and II of the project.
Interest rate	:	Interest on the secured overdraft is to be at 2.5% above our base lending rate (BLR) calculated on the daily overdraft balance. Our current BLR is 10%pa subject to changes at the bank's discretion.
Commitment fee	:	A commitment fee of 1%pa will be levied on the unutilized portion of the overdraft facility.
Disbursement	:	The secured overdraft is to be released in the following manner: (i) RM200,000 on completion of legal and security documentation. (ii) RM1.3m against production of satisfactory evidence for the payment of conversion premium and statutory fees. (iii) Balance of RM4.8m progressively against architect's certificates for work done with advances not exceeding 70% of the value per certificate.
Security	:	The secured overdraft is to be secured by legal charge on land of 37.09 acres, valued at RM9m by Khong & Jaafar per report dated 30 September 1983 to be developed into the said housing estate known as Taman Sri Buloh.
Guarantees	:	(i) A fresh letter of continuing guarantee and indemnity is to be executed by the new directors of the company for the overdraft facility. (ii) The secured overdraft facility is also to be against the corporate guarantee of Fai Chuen Corp Sdn Bhd.
Redemption	:	The secured overdraft is to be repayable by way of redemption moneys in respect of the aforesaid

236 low cost flats/houses, 148 single storey terrace houses, 177 double storey deluxe terrace houses and 13 double storey shophouses as follows:

Type	Redemption sum per unit (RM)
Low cost flats/houses	7,200
Single storey terrace house	16,200
Double storey deluxe terrace house	25,000
Double storey shophouse	52,000

Interest on the overdraft facility is to be serviced monthly.

Conditions of loans accorded under end-financing : The end-financing RM10m facility is to be granted to the individual purchasers of the proposed development in Taman Sri Buloh as follows:

(i) (a) RM9m for houses costing less than RM100,000 each with at least RM3m being to finance bumiputra buyers in this category.

(b) RM1m for shophouses subject to the payment of a fee of 0.5% on the unutilized portion of the facility one year after the date of its acceptance by the company.

(ii) against the legal charge of individual titles or assignment of sale and purchase agreements cum loan agreements and charge-in-escrow pending issuance of strata titles, in the case of flats.

(iii) against the guarantee of your company as well as the personal, joint and several guarantees of all the directors of your company until the issuance of the certificate of fitness for occupation to each respective building.

(iv) on the merits of each case in accordance to our bank's normal guidelines for housing loans. However, the margin of advance on housing loans to non-bumiputra purchasers is to be considered at 80% instead of 75% for units priced between RM25,000–RM100,000.

(v) the end-financing facility is to be made available up to 31 December 1987 after which the unutilized balance will be treated as cancelled.

It is clear from this letter that the sum of RM6.3m was meant for financing the development of the housing estate which sum had already been disbursed

and, prima facie, it should be sufficient to see the housing project through to completion and, if this amount was not sufficient for the completion of the whole project, certainly no blame could justifiably be laid on the respondent on account of the incompetence of the first appellant. A

The other element of the breach of the banking contract is straightforward. The allegation was that the respondent adopted dilatory tactics in approving the 109 applications for the end-finance loans. Even after the architect had duly certified to the respondent that the progressive works had been completed and all other contractual requirements for the release of those loans had been met, the respondent still refused to release the approved end-finance loans. It was this second breach that the appellant pursued and canvassed before us, emphasis being specifically laid upon the essential terms of the banking contract, embodied in the letter of offer dated 3 July 1986 that the overdraft was to be serviced from the redemption moneys to come from the end-finance thereto. It was strenuously argued that when the respondent failed to provide the end-finance loans, the first appellant was unable to service the overdraft account, thereby entitling the first appellant to damages for the breach of the banking contract. B C D

In their defence, an affidavit in support of the application under O 19 r 9, the respondent averred that it was the responsibility of the first appellant to repay the overdraft facilities by whatever means and the redemption moneys out of the end-finance loan was only one of them. We note that it was not provided either in the letter of offer or in the banking contract that the redemption moneys were exclusively to be utilized to repay the bridging finance loan. E

What struck us as a seeming oddity in this argument was that if it was the appellant's case that the failure by the respondent to release the approved end-finance loans which was meant for servicing the bridging finance loans, such argument would provide the appellants with a good defence in the event they were sued for failing to repay the bridging finance loan. But, the appellants' case here was that such failure culminated in the failure of the appellants to continue with and complete the housing project. This is the pith and substance of the appellant' case before us, namely, its sheet anchor. F G

Coming back to the letter of offer dated 3 July 1986, it was noted that the other conspicuous feature of the letter was that the specific and exclusive mode of repayment of both facilities was not stipulated therein though there was a provision that the secured overdraft, namely, the bridging finance loan was to be repayable by way of redemption moneys in respect of the 574 units of low cost houses, single storey terrace houses, double storey deluxe terrace houses and double storey shophouses. It should be explained by evidence, in the absence of clear provisions as to the mode of repayment, whether there is a common practice adopted by all banking and financial institutions in the country that payment of the bridging finance loan is exclusively by way of redemption moneys or from any other available sources as in any ordinary loans. There is nothing sham about the defence raised by the respondent that the repayment of the bridging finance loan H I

may be made by other means at the disposal of the first appellant and not exclusively by way of the redemption moneys.

It is also relevant to note that the RM10m end-finance loans were to be granted, amongst other things, on the merits of each case in accordance with the respondent's normal guidelines for housing loans. This condition was further amplified and reinforced by cl 16 of the agreement dated 22 July 1985 entered into on the one part by the first appellant, referred to therein as the 'company', Chien Kien Chuen, Hoo Ke Ping @ Hoo Khi Ping, Cheah Kok Cheong, Lim Fung Chee and Tengku Mustaffar Ibni Tengku Idris Shah and his guarantors, and United Malayan Banking Corp Bhd on the second part, which agreement was concerned merely with the terms and conditions relating to the end-finance facilities. Again, the absence of the mode of repayment of the end-finance facilities in this agreement was conspicuous. Clause 16 of the agreement on which the respondent relies as its defence on the question of their application to release the end-finance facility reads:

> Notwithstanding anything to the contrary contained in this agreement the bank shall be entitled at its absolute discretion to refuse to grant or continue to advance and release any of the loans or any part thereof to any of the borrowers and nothing contained in this agreement shall be deemed to render it obligatory upon the bank either in law or in equity to grant or to continue to advance and release the loans or any part thereof and the company's and guarantors' respective liabilities under this agreement shall not be discharged or released by virtue of the bank refusing to grant or to continue to advance and release any of the loans or any part thereof.

This clause, in our view, offers the respondent a good defence which has merits and to which the court should pay heed also. We assume, without deciding that the terms of this clause negate specifically the absolute obligation on the part of the respondent to approve any application for the end-finance to any applicant, that no applicant is entitled as of right to any loan applied for. Under the circumstances, how could it be argued that the repayment of the bridging finance must, to the exclusion of all other methods of payment, be by redemption moneys accruing to the qualified borrowers but payable direct to the first appellant. If it is true, as a matter of banking practice which postulates and demands caution in processing any application for loan, the respondent, and for that matter any other prudent banks, should take into account various factors before deciding whether to approve a loan to a particular applicant under the end-finance facility such as:

(a) whether the information supplied by the individual purchasers in their application forms provided sufficient material for the respondent to make a conceded decision one way or the other;
(b) whether the individual purchasers were in a financial position to repay; and
(c) if approved, the amount of any loan, which to a large extent depended on the individual purchaser's financial ability to service the loan;

then there is no absolute certainty that all the 223 applications will be approved. There must inevitably be some applicants who fail to measure up or meet the respondent's commercial standard to offer such loans. In any event, the respondent, by way of the affidavit of Encik Azizan bin Adam, disputed even the number of the approved purchasers. According to him the respondent only received 201 and not 203 applications of which 98 applications were approved while some were first approved and subsequently cancelled and the rest totally rejected. Of the approved applications, the amount due to the applicants and indirectly to be paid to the first appellant would be in the region of RM2,661,500 and not RM7.07m as alleged by the first appellant. Accordingly, arithmetically this sum would not be sufficient to repay the RM6.3m bridging finance loan and the first appellant would still be liable to be sued for the settlement of the balance of that loan together with interest, if any. This defence certainly has substance, providing a bona fide reasonable defence, and goes to reinforce the respondent's contention that the repayment of the bridging finance loans was not solely and exclusively by way of redemption moneys.

In our view, it is only proper that all these issues, which are substantial and have merits, ought to be tried at a proper trial so that witnesses may be called to explain to the court what is the nature of commercial banking practice in processing and approving the loans and other relevant issues. The justice of the case, bearing in mind the substantial claim of the damages, demands nothing less than a proper trial of all the issues.

There is another matter that we should address our minds to, and that is the question of remoteness of damage which really is a question of law for the trial judge to decide. Again, assuming without deciding the question, whichever way the trial judge would decide the question of the real cause of action, either the total failure of the breach due to the breach of the respondent in not disbursing the bridging finance facility to the first appellant or their failure to meet the requirements of the banking contract to release the end-finance facilities to 109 or 98 approved applications, as the case may be, or the combination of both breaches, the question of the remoteness of damage would have to be considered. But, the respondent denied the damages as claimed by the first appellant was due to the breach of the banking contract, thereby without explicitly pleading the issue which, in any event is a question of law and may not be pleaded specifically, (see *Independent Automatic Sales Ltd v Knowles & Foster*[10]), raised the question of remoteness of damage. The test of remoteness of damage is relevant in the law of contract, the basic principle of which had already been enunciated by Alderson B in the case of *Hadley v Baxendale.*[11] Remoteness of damage would certainly provide an arguable defence (per Sir Roger Ormrod) or a prima facie defence (per Lord Atkin). To put it concisely, the respondent has an explanation to all the allegations, the truth of which is denied by the first appellant. At this stage, we are in no position to believe or disbelieve either party, merely on conflict of affidavits and mere interpretation of the agreement dated 22 July 1985 and other contemporaneous documents. These are matters to be argued in detail at the trial.

A Under the circumstances, we see no ground is shown to justify us to interfere with the learned judge's exercise of his discretion under O 19 r 9 of the Rules of the High Court 1980 although admittedly, his Lordship in his brief judgment did not discuss in detail the various questions of the merits of the defence. We, therefore, for the reasons above, dismiss the appeal with costs. The deposit is to be paid to the respondent on account B of taxed costs.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim

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